

Congress of the United States
Washington, DC 20515

January 26, 2023

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

The Honorable Michael L. Connor
Assistant Secretary of the Army for Civil
Works
U.S. Department of the Army
108 Army Pentagon
Washington, DC 20310-0108

Dear Administrator Regan and Assistant Secretary Connor:

We write in strong opposition to the recent decision by the Environmental Protection Agency (EPA) and the U.S. Department of the Army (collectively “the agencies”) to issue a new final rule defining “waters of the United States” (WOTUS) under the Clean Water Act.¹ For decades, confusion, regulatory uncertainty, and litigation have surrounded the scope of federal authority over our nation’s waters, and this final rule continues that uncertainty.

Since 2015, the agencies have attempted to establish new WOTUS regulations under three different administrations. American industry – particularly agriculture – relies on clear, consistent, and manageable regulatory guidance. Administrator Regan stated on February 3, 2021, at a Senate hearing on his nomination as EPA Administrator, that you “...don’t want to lose the opportunity to take a look at what we have learned with the Obama-era Waters of the U.S. and the Trump-era Waters of the U.S.”² However, the agencies have just released the fourth definition of WOTUS since 2015.

Rural communities in the West and across the country are dedicated to clean water and do not deserve to be punished by the continued legal uncertainty that this new final rule promulgates. Violations of the Clean Water Act carry significant criminal and civil penalties meaning that farmers, ranchers, and small business owners could face jail time and thousands of dollars in fines a day for making changes to their property. While some longstanding exemptions for farming activities were maintained in this new rule, we are extremely concerned by the removal of provisions in the Trump Administration’s Navigable Waters Protection Rule that gave certainty to our farmers, ranchers, and agricultural industry. These changes mean that agency

¹ Press Release, EPA, *EPA and Army Finalize Rule Establishing Definition of WOTUS and Restoring Fundamental Water Protections*, December 30, 2022, available at <https://www.epa.gov/newsreleases/epa-and-army-finalize-rule-establishing-definition-wotus-and-restoring-fundamental>

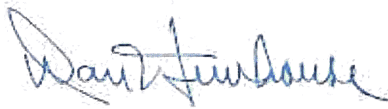
² Hearing on the Nomination of Michael S. Regan to be Administrator of the Environmental Protection, U.S. Senate Environment & Public Works Committee, February 3, 2021, Page 46-47, available at https://www.epw.senate.gov/public/_cache/files/b/b/bb8ad566-12ca-4ff6-adb5-e3f61d44b3ab/736007F6C59AEDCCF63FD6C63517DAD5.spw-02032021-nomination-hearing.pdf

permits could be required for normal farming activities – such as removing debris and vegetation from a ditch, applying pesticides, changing the type of crops grown on a field, or constructing a fence or pond. Permitting is a costly and time-consuming process that requires farmers and ranchers to hire attorneys and consultants they often cannot afford. It is unacceptable that the agencies continue to create regulatory uncertainty for farmers, ranchers, small businesses, and landowners.

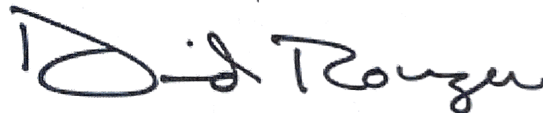
Additionally, this new rule completely discounts a pending United States Supreme Court decision on *Sackett v. EPA*, which will address the scope of agency authority that was granted by Congress in the Clean Water Act.³ The agencies' continued reliance on the significant nexus standard throughout the new final rule will face legal challenges when the *Sackett* decision is released, furthering the legal uncertainty that Americans will face if significant portions of the new rule have to be changed. The timing of this new final rule – quietly released over the holidays on the last working day of 2022 – raises concerns that this was done deliberately by the agencies to score political points and appease activists.

The American people deserve certainty and an assurance that existing rules and regulations will not fluctuate with the threat of criminal penalties and significant financial hardship for failing to abide by the ever-changing rules. This new WOTUS definition will only increase regulatory uncertainty and worsen conditions for farmers, ranchers, job creators, and landowners. Given this, we urge you to rescind the rule and postpone any subsequent agency action on WOTUS to allow the Supreme Court to issue an opinion on *Sackett v. EPA*.

Sincerely,



Dan Newhouse
Member of Congress



David Rouzer
Member of Congress

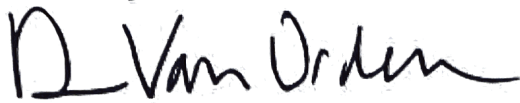


Mike Bost
Member of Congress



Mariannette Miller-Meeks, M.D.
Member of Congress

³ Supreme Court of the United States, *Sackett v. EPA*, October 3, 2022, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-454_8m59.pdf



Derrick Van Orden
Member of Congress



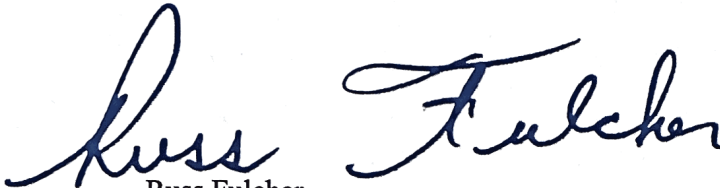
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Member of Congress



Brad Finstad
Member of Congress



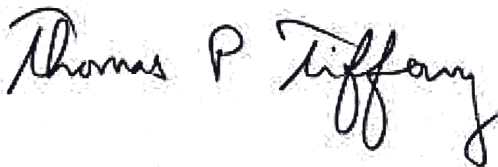
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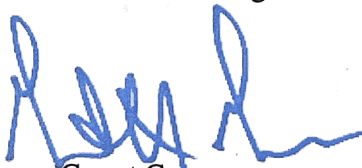
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